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No. 87-789

IN THE

Supreme Court of the United States

October Term, 1987

JOE T. GONZALES,

Petitioner,

v.

SECRETARY OF THE AIR FORCE AND
DEPARTMENT OF THE AIR FORCE,

Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN E. TOBIN
Counsel of Record
EDWARD J. PLUIMER
PATRICIA C. HAYASHI
DORSEY & WHITNEY
350 Park Avenue
New York, New York 10022
(212) 415-9200

WILLIAM L. ROBINSON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

GEORGE A. GONZALES
P.O. Box 5273
100 Chestnut, Suite 102
Abilene, Texas 79602
(905) 676-5531

Attorneys for Petitioner
JOE T. GONZALES

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In the Memorandum for the Respondents in Opposition, respondents raise only one new argument. They suggest that the Court is unlikely to have additional opportunities to rule on the issue presented herein because the U.S. Equal Employment Opportunity Commission ("EEOC") has recognized the systemic confusion caused by the former version of its Right to Sue letter and has amended the letter to provide express instructions that the Title VII claimant must name the department head as a party in his federal suit.

Respondents' argument ignores the continuing unfairness of a situation that is likely to reoccur: after prosecuting his claims against a federal agency, the individual claimant must suddenly and inexplicably bring an action in federal court

against the head of the department or lose his right to have his claims heard on the merits in federal court. The claimant would be denied the just and fair application of the Federal Rules of Civil Procedure and would be allowed to fall victim to a draconian and hyper-technical application of Rule 15(c), "demonstrably at odds with the language, purpose, and history of the Rule." *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 2390 (1986) (Stevens, J., dissenting).

The amended EEOC Right to Sue letter does not provide a remedy for the numerous Title VII claimants with actions in the federal courts, many of whom have brought their district court actions *pro se*. All those litigants, as the petitioner, made one foreseeable and honest mistake—they instituted their district court actions against the department or agency, their adversary in their prior administrative proceedings. Yet, their civil rights claims will be dismissed without a determination by a federal court on the merits, if the Fifth Circuit's application of *Schiavone* is not reviewed.

The amendment by the EEOC of the Right to Sue letter underscores the magnitude and prevalence of this unfortunate and unjust problem. The EEOC now recognizes that a claimant's ability to pursue his claim on the merits should not be curtailed by the hyper-technical mistake of naming only the department in the federal court caption. Yet, the respondents argue for the continued harsh application of *Schiavone* to those numerous claimants for whom the EEOC's well-intentioned efforts have come too late to provide them with their congressionally mandated day in court.

The amended EEOC Right to Sue letter is not the panacea to the incorrect application of *Schiavone*. The consequences of the decision below represent a currently existing systemic problem with far-reaching consequences that should be reviewed by this Court.

In addition, the respondents do not address the misapplication of *Schiavone* by the lower courts, including the court in this case. Respondents fail to address the stark and

undeniable distinctions between the facts of *Schiavone* and the instant case.

Schiavone involved a one-year state statute of limitations for libel. The *Schiavone* plaintiff was not involved in a four-year adversarial administrative proceeding prior to instituting his district court action. The *Schiavone* plaintiff was never required to exhaust his administrative claims against the entity which he ultimately (but mistakenly) named as a party in his district court action. The *Schiavone* plaintiff was never required to file his action within the concededly short period of thirty days.

In *Schiavone*, the Court did not address a federal remedial statute, which this Court has held must be liberally construed. Title VII was designed by Congress to be followed by lay people, untrained in the complexities and difficulties of administrative and civil rights laws. *Schiavone* is therefore clearly not applicable in the Title VII context, and the clear distinctions between *Schiavone* and the instant case mandate that the lower courts reach a different result.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

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New York, New York

Respectfully submitted,

John E. Tobin
Counsel of Record
Edward J. Pluimer
Patricia C. Hayashi

DORSEY & WHITNEY
350 Park Avenue
New York, New York 10022
(212) 415-9200

William L. Robinson
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Joe T. Gonzales